

**FEDERAL ELECTION COMMISSION**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR 7136**

DATE COMPLAINT FILED: Sept. 19, 2016

DATE OF NOTIFICATIONS: Sept. 23, 2016

RESPONSE RECEIVED: Nov. 15, 2016

DATE ACTIVATED: Jan. 31, 2017

EXPIRATION OF SOL: May 24 to July 19, 2021

ELECTION CYCLE: 2016

**COMPLAINANT:**

Foundation for Accountability and Civic Trust

**RESPONDENTS:**

Ted Strickland

Strickland for Senate and Michael J. Johrendt  
in his official capacity as treasurer

Senate Majority PAC and Rebecca Lambe in  
her official capacity as treasurer

**RELEVANT STATUTES  
AND REGULATIONS:**

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30118(a)

11 C.F.R. § 109.21

11 C.F.R. § 109.23

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**AGENCIES CHECKED:**

None

**I. INTRODUCTION**

Complainant alleges that the principal campaign committee of U.S. Senate candidate Ted Strickland, Strickland for Senate and Michael J. Johrendt in his official capacity as treasurer ("Committee"), coordinated advertisements with Senate Majority PAC, an independent-expenditure-only political committee ("IEOPC"), resulting in excessive and prohibited in-kind contributions. We recommend that the Commission find no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(a), 30116(f) or 30118(a), and close the file.

1    **II.    FACTUAL BACKGROUND**

2            Complainant alleges that the Committee coordinated advertisements with Senate  
3    Majority PAC by placing information on the "Ohio Needs to Know" page of its publicly  
4    available campaign website for the purpose of directing Senate Majority PAC to purchase  
5    advertisements in specific markets and with specific messages.

6            On June 28, 2016, the Committee posted to its website the following message: "Once  
7    Ohioans understand the contrast between Portman and Strickland on retirement security, Ohioans  
8    across the state need to know about the contrast between Portman and Strickland on tax policy."<sup>1</sup>

9            On July 7, 2016, just more than a week later, Senate Majority PAC disseminated an ad  
10   transcribed as follows:

11                    Here we are on Wall Street and somebody up there is probably  
12                    writing Rob Portman a check. Wall Street's given Portman  
13                    millions in campaign contributions and pushed a plan to privatize  
14                    social security and risk your retirement in the stock market. Wall  
15                    Street gets hundreds of billions in fees even if the market crashes.  
16                    Maybe Rob Portman should be running as senator of Wall Street,  
17                    not Ohio.<sup>2</sup>

18  
19            On July 12, 2016, the Committee updated the website again, stating this time that  
20   "Ohioans across the state will always need to know about the contrast between Ted Strickland  
21   and Senator Portman on trade policy. Portman is the best senator China's ever had – he voted

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<sup>1</sup> Compl. at 3, Ex. B; *see also* Strickland for Senate, Ohio Needs to Know Page, WAYBACK MACHINE (June 29, 2016), <https://web.archive.org/web/20160629150021/www.tedstrickland.com/ohio-needs-to-know>.

<sup>2</sup> Compl. at 3; *see also* Senate Majority PAC, *Street*, YOUTUBE (published July 7, 2016), <https://www.youtube.com/watch?v=YMssaB3C2es>. Senate Majority PAC disclosed a media buy opposing Portman on July 7, 2016 for \$1,789,477. *See* Senate Majority PAC 24/48 Hour Report of Independent Expenditures (July 8, 2016). According to the Complaint, the ad aired on television. Compl. Ex. A (Maggie Stevens, *Democratic Candidates Writing Instructions to Super PACs on Their Websites*, POLITICO (July 15, 2016)); *see also* Strickland for Senate Resp. at 2. According to a press account, Senate Majority PAC was set to run the ad in Cleveland, Cincinnati, Dayton, Columbus, Toledo and Youngstown. *See* Associated Press, *Senate Majority PAC Spending \$2.5M in Ohio Against Portman*, NEWS-HERALD (July 7, 2016), <http://www.news-herald.com/article/HR/20160707/NEWS/160709653>.

1 for job killing trade deals like NAFTA, permanent most favored trading status for China and  
2 unfair trade deals that cost Ohio over 300,000 jobs.”<sup>3</sup>

3 On July 19, 2016, one week later, Senate Majority PAC disseminated an ad transcribed as  
4 follows:

5 This is the Chinese embassy in Washington. Wonder what they’re  
6 up to in there. Probably giving Rob Portman an award for being  
7 China’s best senator. After all, Portman voted for eight different  
8 trade deals. Portman even led the fight to give the Chinese  
9 permanent special trading status. Sure hope Rob Portman is not in  
10 there negotiating another trade deal. Hard to believe this guy is  
11 running for reelection in Ohio.<sup>4</sup>  
12

13 Complainant argues that the specificity of the Committee’s website regarding the  
14 message and the desired media markets coupled with the timing of when Senate Majority PAC  
15 ran ads with similar messages indicates that the Committee used the website to coordinate the  
16 ads with Senate Majority PAC. Therefore, Senate Majority PAC allegedly made, and the  
17 Committee accepted, prohibited and excessive contributions.<sup>5</sup>

18 In its response, the Committee argues that the information posted on the Committee’s  
19 publicly available website cannot satisfy the coordinated communications test as a matter of law  
20 and, therefore, the Commission should find no reason to believe that a violation occurred.<sup>6</sup>

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<sup>3</sup> Compl. at 4, Ex. C; *see also* Strickland for Senate, Ohio Needs to Know Page, WAYBACK MACHINE (Aug. 7, 2016), <https://web.archive.org/web/20160807192002/www.tedstrickland.com/ohio-needs-to-know>.

<sup>4</sup> Compl. at 4; *see also* Senate Majority PAC, *Embassy*, (published July 19, 2016), <https://www.youtube.com/watch?v=tOSw6AuZtWQ>. Senate Majority PAC disclosed a media buy opposing Portman on July 19, 2016 for \$1,905,458. *See* Senate Majority PAC 24/48 Hour Report of Independent Expenditures (July 21, 2016). According to a press account, Senate Majority PAC aired this ad on television on both cable and broadcast statewide. *See* Lisa Hagen, *Super-PAC Targets Portman on Trade*, THE HILL (July 19, 2016), <http://thehill.com/homenews/senate/288275-super-pac-targets-portman-on-trade>.

<sup>5</sup> Compl. at 5-7.

<sup>6</sup> Strickland for Senate Resp. at 5-6. Neither Ted Strickland nor Senate Majority PAC submitted a response.

1     **III.   LEGAL ANALYSIS**

2           The Act provides that an expenditure made by any person “in cooperation, consultation,  
3   or concert, with, or at the request or suggestion of, a candidate, his authorized political  
4   committees, or their agents” constitutes an in-kind contribution.<sup>7</sup> IEOPCs are prohibited from  
5   making contributions to candidates and their authorized committees.<sup>8</sup> Further, it is unlawful for  
6   candidates and political committees to knowingly accept a prohibited or excessive contribution.<sup>9</sup>

7           The Commission’s regulations provide a three-part test for determining when a  
8   communication is a coordinated expenditure, which is treated as an in-kind contribution.<sup>10</sup> The  
9   communication must: (1) be paid for by a third party; (2) satisfy one of the “content” standards  
10   listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of the “conduct” standards listed in 11 C.F.R.  
11   § 109.21(d).<sup>11</sup> Respondents do not challenge that the first two elements are satisfied.

12          As to the third element, Complainant argues that the ads satisfy the “request or  
13   suggestion” conduct standard, which requires that the communication be “created, produced, or  
14   distributed at the request or suggestion of a candidate [or] authorized committee.”<sup>12</sup> The  
15   Commission has explained that the “request or suggestion” standard refers to requests or

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<sup>7</sup>       52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20 (definition of “coordinated”), 52 U.S.C. § 30104(b) (requiring political committees to disclose to the Commission contributions received from other political committees and persons).

<sup>8</sup>       *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. 2010-11 (Commonsense Ten) at 2-3.

<sup>9</sup>       *See* 52 U.S.C. §§ 30116(f), 30118(a).

<sup>10</sup>      11 C.F.R. § 109.21(a)-(b).

<sup>11</sup>      *Id.* § 109.21(a).

<sup>12</sup>      *Id.* § 109.21(d)(1); *see also* Compl. at 6.

1 suggestions "made to a select audience, but not those offered to the public generally."<sup>13</sup> In  
2 describing the distinction between generalized and targeted requests, the Commission observed  
3 that "a request that is posted on a web page that is available to the general public is a request to  
4 the general public and does not trigger the [request or suggestion] conduct standard," whereas a  
5 request sent through an intranet service or by email to a discrete group of recipients would satisfy  
6 the standard.<sup>14</sup>

7 In MUR 7124 (McGinty for Senate), the Commission found that the use of publicly  
8 available information, including the use of information contained on a candidate's website, was  
9 not sufficient to satisfy the "request or suggestion" conduct standard.<sup>15</sup> In that case, the  
10 Complaint alleged that McGinty's principal campaign committee coordinated with IEOPCs by  
11 posting on its website information it wanted incorporated in ads in certain markets with the code  
12 words "voters need to know."<sup>16</sup> The IEOPCs in that matter allegedly responded to the posts with  
13 ads in the desired markets. The Commission found no reason to believe that a violation had  
14 occurred because the "cited similarities between the [website] and the commercials, and the

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<sup>13</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) ("2003 E&J"). The Complaint argues that in 2006 the Commission added a safe harbor to each conduct standard under the regulations for publicly available information except the request or suggestion conduct standard, which purportedly evidences the Commission's intent to exclude the request or suggestion conduct standard from the safe harbor. *See* Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) ("2006 E&J"). The 2006 E&J, however, explicitly notes that the publicly available information safe harbor was not added to the "request or suggestion" conduct standard to avoid circumvention of the coordination rules when a payor uses publicly available information *in conjunction with* a candidate's privately conveyed request or suggestion. *Id.* There is no allegation here that the Committee made any private request or suggestion to Senate Majority PAC.

<sup>14</sup> *See* 2003 E&J at 432.

<sup>15</sup> Factual & Legal Analysis ("F&LA") at 10, MUR 7124 (McGinty for Senate); *see also* F&LA at 7-8, MUR 6821 (Shaheen for Senate).

<sup>16</sup> F&LA at 3, MUR 7124 (McGinty for Senate). Complainant relied on the same Politico article in both complaints. *See id.* Compl. Ex. A; Compl. Ex. A, MUR 7136 (Strickland for Senate).

1 timing and geographic placement of the commercials, are insufficient to show that any additional  
2 private communications occurred.”<sup>17</sup>

3 Similar to MUR 7124, here the alleged request for advertising made by the Committee  
4 was communicated only by information appearing on the candidate’s publicly available  
5 campaign website. The Complaint does not allege any private communication between the  
6 Committee and Senate Majority PAC. The similarities between the website information and  
7 the timing and placement of the ads disseminated by Senate Majority PAC, just as in MUR 7124,  
8 are insufficient standing alone to show that any additional private communications occurred.  
9 Therefore, the communication at issue does not appear to satisfy the conduct standard.<sup>19</sup>

10 Because the available record does not provide information sufficient to show that the  
11 Committee may have coordinated with Senate Majority PAC, we recommend that the  
12 Commission find no reason to believe that Respondents violated 52 U.S.C. §§ 30116(a),  
13 30116(f) or 30118(a), and close the file.<sup>20</sup>

#### 14 IV. RECOMMENDATIONS

- 15 1. Find no reason to believe that Ted Strickland violated 52 U.S.C. §§ 30116(f) or 30118(a);  
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<sup>17</sup> F&LA at 10, MUR 7124 (McGinty for Senate); *id.*, Certification (Apr. 28, 2017).

<sup>19</sup> See F&LA at 10-11, MUR 7124 (McGinty for Senate). Though not alleged, we also note that the ad does not appear to constitute a republication of campaign materials because the ads are merely thematically similar to the website and not a direct copy of any campaign materials of which we are aware. See 11 C.F.R. § 109.23; see also F&LA at 7, MUR 6821 (Shaheen for Senate).

<sup>20</sup>

See MUR 7142 (Evan Bayh Committee).

2. Find no reason to believe that Strickland for Senate and Michael J. Johrendt in his official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a);
3. Find no reason to believe that Senate Majority PAC and Rebecca Lambe in her official capacity as treasurer violated 52 U.S.C. §§ 30116(a) or 30118(a);
4. Approve the attached Factual and Legal Analysis;
5. Approve the appropriate letters; and
6. Close the file.

Lisa J. Stevenson  
Acting General Counsel

10/24/17  
DATE

Kathleen M. Guith  
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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Ted Strickland **MUR: 7136**  
Strickland for Senate and Michael J. Johrendt  
in his official capacity as treasurer  
Senate Majority PAC and Rebecca Lambe in  
her official capacity as treasurer

**I. INTRODUCTION**

Complainant alleges that the principal campaign committee of U.S. Senate candidate Ted Strickland, Strickland for Senate and Michael J. Johrendt in his official capacity as treasurer ("Committee"), coordinated advertisements with Senate Majority PAC, an independent-expenditure-only political committee ("IEOPC"), resulting in excessive and prohibited in-kind contributions. For the reasons below, the Commission finds no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(a), 30116(f) or 30118(a), and closes the file.

**II. FACTUAL BACKGROUND**

Complainant alleges that the Committee coordinated advertisements with Senate Majority PAC by placing information on the "Ohio Needs to Know" page of its publicly available campaign website for the purpose of directing Senate Majority PAC to purchase advertisements in specific markets and with specific messages.

On June 28, 2016, the Committee posted to its website the following message: "Once Ohioans understand the contrast between Portman and Strickland on retirement security, Ohioans across the state need to know about the contrast between Portman and Strickland on tax policy."<sup>1</sup>

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<sup>1</sup> Compl. at 3, Ex. B; *see also* Strickland for Senate, Ohio Needs to Know Page, WAYBACK MACHINE (June 29, 2016), <https://web.archive.org/web/20160629150021/www.tedstrickland.com/ohio-needs-to-know>.



1 On July 7, 2016, just more than a week later, Senate Majority PAC disseminated an ad  
2 transcribed as follows:

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4 writing Rob Portman a check. Wall Street's given Portman millions  
5 in campaign contributions and pushed a plan to privatize social  
6 security and risk your retirement in the stock market. Wall Street  
7 gets hundreds of billions in fees even if the market crashes. Maybe  
8 Rob Portman should be running as senator of Wall Street, not Ohio.<sup>2</sup>  
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10 On July 12, 2016, the Committee updated the website again, stating this time that  
11 "Ohioans across the state will always need to know about the contrast between Ted Strickland  
12 and Senator Portman on trade policy. Portman is the best senator China's ever had – he voted  
13 for job killing trade deals like NAFTA, permanent most favored trading status for China and  
14 unfair trade deals that cost Ohio over 300,000 jobs."<sup>3</sup>

15 On July 19, 2016, one week later, Senate Majority PAC disseminated an ad transcribed as  
16 follows:

17 This is the Chinese embassy in Washington. Wonder what they're  
18 up to in there. Probably giving Rob Portman an award for being  
19 China's best senator. After all, Portman voted for eight different  
20 trade deals. Portman even led the fight to give the Chinese  
21 permanent special trading status. Sure hope Rob Portman is not in  
22 there negotiating another trade deal. Hard to believe this guy is  
23 running for reelection in Ohio.<sup>4</sup>

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<sup>2</sup> Compl. at 3; *see also* Senate Majority PAC, *Street*, YOUTUBE (published July 7, 2016), <https://www.youtube.com/watch?v=YMssaB3C2es>. Senate Majority PAC disclosed a media buy opposing Portman on July 7, 2016 for \$1,789,477. *See* Senate Majority PAC 24/48 Hour Report of Independent Expenditures (July 8, 2016). According to the Complaint, the ad aired on television. Compl. Ex. A (Maggie Stevens, *Democratic Candidates Writing Instructions to Super PACs on Their Websites*, POLITICO (July 15, 2016)); *see also* Strickland for Senate Resp. at 2.

<sup>3</sup> Compl. at 4, Ex. C; *see also* Strickland for Senate, Ohio Needs to Know Page, WAYBACK MACHINE (Aug. 7, 2016), <https://web.archive.org/web/20160807192002/www.tedstrickland.com/ohio-needs-to-know>.

<sup>4</sup> Compl. at 4; *see also* Senate Majority PAC, *Embassy*, (published July 19, 2016), <https://www.youtube.com/watch?v=tOSw6AuZtWQ>. Senate Majority PAC disclosed a media buy opposing Portman on July 19, 2016 for \$1,905,458. *See* Senate Majority PAC 24/48 Hour Report of Independent Expenditures (July 21, 2016).

1  
2 Complainant argues that the specificity of the Committee's website regarding the  
3 message and the desired media markets coupled with the timing of when Senate Majority PAC  
4 ran ads with similar messages indicates that the Committee used the website to coordinate the  
5 ads with Senate Majority PAC. Therefore, Senate Majority PAC allegedly made, and the  
6 Committee accepted, prohibited and excessive contributions.<sup>5</sup>

7 In its response, the Committee argues that the information posted on the Committee's  
8 publicly available website cannot satisfy the coordinated communications test as a matter of law  
9 and, therefore, the Commission should find no reason to believe that a violation occurred.<sup>6</sup>

### 10 III. LEGAL ANALYSIS

11 The Act provides that an expenditure made by any person "in cooperation, consultation,  
12 or concert, with, or at the request or suggestion of, a candidate, his authorized political  
13 committees, or their agents" constitutes an in-kind contribution.<sup>7</sup> IEOPCs are prohibited from  
14 making contributions to candidates and their authorized committees.<sup>8</sup> Further, it is unlawful for  
15 candidates and political committees to knowingly accept a prohibited or excessive contribution.<sup>9</sup>

16 The Commission's regulations provide a three-part test for determining when a  
17 communication is a coordinated expenditure, which is treated as an in-kind contribution.<sup>10</sup> The

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<sup>5</sup> Compl. at 5-7.

<sup>6</sup> Strickland for Senate Resp. at 5-6. Neither Ted Strickland nor Senate Majority PAC submitted a response.

<sup>7</sup> 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20 (definition of "coordinated"), 52 U.S.C. § 30104(b) (requiring political committees to disclose to the Commission contributions received from other political committees and persons).

<sup>8</sup> *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. 2010-11 (Commonsense Ten) at 2-3.

<sup>9</sup> *See* 52 U.S.C. §§ 30116(f), 30118(a).

<sup>10</sup> 11 C.F.R. § 109.21(a)-(b).

1 communication must: (1) be paid for by a third party; (2) satisfy one of the “content” standards  
2 listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of the “conduct” standards listed in 11 C.F.R.  
3 § 109.21(d).<sup>11</sup> Respondents do not challenge that the first two elements are satisfied.

4 As to the third element, Complainant argues that the ads satisfy the “request or  
5 suggestion” conduct standard, which requires that the communication be “created, produced, or  
6 distributed at the request or suggestion of a candidate [or] authorized committee.”<sup>12</sup> The  
7 Commission has explained that the “request or suggestion” standard refers to requests or  
8 suggestions “made to a select audience, but not those offered to the public generally.”<sup>13</sup> In  
9 describing the distinction between generalized and targeted requests, the Commission observed  
10 that “a request that is posted on a web page that is available to the general public is a request to  
11 the general public and does not trigger the [request or suggestion] conduct standard,” whereas a  
12 request sent through an intranet service or by email to a discrete group of recipients would satisfy  
13 the standard.<sup>14</sup>

14 In MUR 7124 (McGinty for Senate), the Commission found that the use of publicly  
15 available information, including the use of information contained on a candidate’s website, was

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<sup>11</sup> *Id.* § 109.21(a).

<sup>12</sup> *Id.* § 109.21(d)(1); *see also* Compl. at 6.

<sup>13</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) (“2003 E&J”). The Complaint argues that in 2006 the Commission added a safe harbor to each conduct standard under the regulations for publicly available information except the request or suggestion conduct standard, which purportedly evidences the Commission’s intent to exclude the request or suggestion conduct standard from the safe harbor. *See* Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (“2006 E&J”). The 2006 E&J, however, explicitly notes that the publicly available information safe harbor was not added to the “request or suggestion” conduct standard to avoid circumvention of the coordination rules when a payor uses publicly available information *in conjunction with* a candidate’s privately conveyed request or suggestion. *Id.* There is no allegation here that the Committee made any private request or suggestion to Senate Majority PAC.

<sup>14</sup> *See* 2003 E&J at 432.

1 not sufficient to satisfy the “request or suggestion” conduct standard.<sup>15</sup> In that case, the  
2 Complaint alleged that McGinty’s principal campaign committee coordinated with IEOPCs by  
3 posting on its website information it wanted incorporated in ads in certain markets with the code  
4 words “voters need to know.”<sup>16</sup> The IEOPCs in that matter allegedly responded to the posts with  
5 ads in the desired markets. The Commission found no reason to believe that a violation had  
6 occurred because the conduct standard of the coordinated communications test had not been  
7 satisfied: Posting material to the campaign’s publicly available website did not satisfy the  
8 request or suggestion standard.<sup>17</sup> Similar to MUR 7124, here, the alleged request for advertising  
9 made by the Committee was communicated only by information appearing on the candidate’s  
10 publicly available campaign website.<sup>18</sup> Therefore, the communication at issue does not satisfy  
11 the conduct standard.<sup>19</sup>

12 Because the available record does not provide information sufficient to show that the  
13 Committee may have coordinated with Senate Majority PAC, the Commission finds no reason to

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<sup>15</sup> Factual & Legal Analysis (“F&LA”) at 10, MUR 7124 (McGinty for Senate); *see also* F&LA at 7-8, MUR 6821 (Shaheen for Senate).

<sup>16</sup> F&LA at 3, MUR 7124 (McGinty for Senate). Complainant relied on the same Politico article in both complaints. *See id.* Compl. Ex. A; Compl. Ex. A, MUR 7136 (Strickland for Senate).

<sup>17</sup> F&LA at 9-10, MUR 7124 (McGinty for Senate); *id.*, Certification (Apr. 28, 2017). One of the super PAC’s ads in MUR 7124 (McGinty for Senate) ran *before* the candidate’s website posted the alleged “request” for the ad. Thus, the complaint in MUR 7124 “suggests that the [candidate’s] Committee may have informed [the super PAC] of the [request] in private” prior to posting the request on the candidate’s website, F&LA at 7, MUR 7124 (McGinty for Senate), or may have retroactively approved the super PAC’s ad. *See* Complaint at 7, MUR 7124 (McGinty for Senate). In response, the Commission found that that the “cited similarities between the [website] and the commercials, and the timing and geographic placement of the commercials, are insufficient to show that any additional private communications occurred.” *Id.* at 10. Here, the Complaint does not allege that the super PAC aired ads before the Committee’s alleged “request” was made.

<sup>18</sup> F&LA at 10, MUR 7124 (McGinty for Senate).

<sup>19</sup> *See* F&LA at 10-11, MUR 7124 (McGinty for Senate). Though not alleged, we also note that the ad does not appear to constitute a republication of campaign materials because the ads are merely thematically similar to the website and not a direct copy of any campaign materials of which we are aware. *See* 11 C.F.R. § 109.23; *see also* F&LA at 7, MUR 6821 (Shaheen for Senate).

- 1 believe that Respondents violated 52 U.S.C. §§ 30116(a), 30116(f) or 30118(a), and closes the
- 2 file.